

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 04/21/2020

TIME: 10:00:00 AM

DEPT: 20

JUDICIAL OFFICER PRESIDING: Matthew P. Guasco

CLERK: Denise Arreola

REPORTER/ERM:

CASE NO: **56-2018-00511366-CU-PO-VTA**

CASE TITLE: **Nava Chavez vs Mountain View Properties**

CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT TYPE: Ruling on Submitted Matter

APPEARANCES

The Court, having previously taken the Motion for Summary Adjudication under submission, now rules as follows:

On March 12, 2020, at 8:20 a.m., in Courtroom 20, the matter came before the Court for hearing on the motion of plaintiffs, Eduardo Nava Chavez ("decedent"), Maria Elena Nava as administrator of the decedent's estate; the Estate of Eduardo Nava Chavez; Sheila Nava, a minor by her GAL; Isabela Nava, a minor by her GAL; and Omero Nava Chavez ("Omero") (collectively, "plaintiffs"), for summary adjudication of issues and defenses as against defendants, Mountain View Properties, LP ("MVP"), BVC Development Corp. ("BVC"). The parties appeared as set forth in the Clerk's minutes. The Court received and considered the pleadings and arguments of counsel in support of and opposition to the motion. At the conclusion of the arguments, the Court took the matter under submission. The following is the Court's ruling on that submitted matter.

Evidentiary Objections

The Court SUSTAINS plaintiffs' objections to the Declaration of Gilly Rojany as follows: 12-15 on the grounds of lack of foundation only. In all other respects, the Court OVERRULES plaintiffs' objections to Mr. Rojany's declaration.

The Court SUSTAINS plaintiffs' objections to the Declaration of Christy Dabbour as follows: 5 (IN PART, as to sentence, ". . . where he would check the progress of the work and the crew"; grounds: lack of foundation, speculation), 14 (IN PART, as to phrase, ". . . and to Wall Constructors' superintendent"; grounds: lack of foundation, speculation), and 15-17 (grounds: lack of foundation, speculation only). In all other respects, the Court OVERRULES plaintiffs' objections to Mr. Dabbour's declaration.

The Court OVERRULES MVP's and BVC's objections to the Declaration of Morris Farkas. The objections go to the weight, not the admissibility, of Mr. Farkas's opinions.

Undisputed Material Facts ("UMF"s)

For the purposes of the ruling on this motion only, the Court makes the following findings concerning the

UMFs:

The Court finds the following UMFs are established by the supporting evidence: 1-2, 4-5, 9-10, 14-18, 21, and 23-26.

The Court finds the following UMFs are not established by the supporting evidence: 3, 6-8, 11-13, 19-20, 22, and 27.

Legal Principles Governing Summary Judgment/Adjudication

Summary judgment procedure is well settled: "A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code of Civ. Proc., § 437c, subd. (a).) A party may also move for "summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty. . . ." (Code of Civ. Proc., § 437c, subd. (f)(1).) "The court must grant the motion if all the papers submitted show that there is no triable issue as to any material fact [citation omitted]-that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations omitted]-and that the moving party is entitled to a judgment as a matter of law [citation omitted]." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855-56, 107 Cal.Rptr.2d 841, 24 P.3d 493, internal quotation marks omitted ("*Aguilar*").) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Id.*, 25 Cal.4th at p. 855, 107 Cal.Rptr.2d 841, 24 P.3d 493.) The court must construe the evidentiary showing, and all reasonable inferences therefrom, in the light most favorable to the opposing party. (*Id.*, 25 Cal.4th at p. 857, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

The Court follows a three-part test in ruling on the motion:

(a) "First, . . . the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id.*, 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

(b) "Second, . . . the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*)

(c) "Third, . . . how the parties moving for and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which would bear what burden of proof at trial." (*Id.*, 25 Cal.4th at p. 851, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

In determining whether a material triable issue exists, the Court must construe the evidence offered by the moving party in support of the motion strictly and the evidence offered in opposition to the motion liberally. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839, 89 Cal.Rptr.2d 540.) Moreover, the Court is not permitted to weigh or assess the credibility of, or resolve conflicts concerning, the evidence offered in support of or opposition to the motion; conflicts in the evidence must be resolved by the trier of fact, not the Court. (Code of Civ. Proc., §437c, subd. (e); *Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1397, fn. 4, 93 Cal.Rptr.2d 763; *AARTS Productions, Inc. v. Aetna Life Ins. Co.* (1986) 179 Cal.App.3d 1061, 1064, 225 Cal.Rptr. 203.)

Ruling on Motion

For the following reasons, the Court DENIES plaintiffs' motion for summary adjudication:

(1) The motion seeks an adjudication in plaintiffs' favor concerning the First and Seventh Causes of Action of the Complaint on the issue of duty; and as to the Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, and Nineteenth Affirmative Defenses set forth in MVP's and BVC's Answer.

(2) Issues 1, 2, 4, and 5 are facts; they are not appropriate for summary adjudication. These facts do not completely dispose of an entire cause of action, or resolve an issue of duty, or resolve an affirmative defense. (Code of Civ. Proc., § 437c, subd. (f)(1).)

(3) Issues 8-11 are not supported by admissible evidence. Instead, they rely entirely on the Complaint. A pleading is not evidence.

(4) Issues 3, 6, 7 are materially disputed facts involving the existence of a duty and its breach, particularly in the context of the application of the *Privette* doctrine as a complete defense to the Complaint. (*Privette v. Superior Court (Contreras)* (1993) 5 Cal.4th 689, 21 Cal.Rptr.2d 72, 854 P.2d 721 ("Privette").) Under the *Privette* doctrine, worker's compensation is the exclusive remedy for an employee of an independent contractor who is injured on the worksite. The injured employee may not sue the independent contractor in tort. Additionally, the hirer of the independent contractor may not be sued in tort by the injured employee. The exclusivity of the worker's compensation remedy inures to the benefit of the independent contractor and its hirer. (*Privette, supra*, 5 Cal.4th at 697-698, 702, 21 Cal.Rptr.2d 72, 854 P.2d 721.)

(5) Here, it is undisputed that the decedent was an employee of Wall Constructors, Inc. ("Wall"), a drywall subcontractor hired by the general contractor, BVC, on behalf of the developer, MVP. Dabbour was BVC's on-site construction supervisor on the project. The project was the construction of two apartment buildings. The fatal accident occurred when the decedent stepped on a stack of drywall which had been placed in front of an open elevator shaft. As he worked, the decedent lost his balance and fell down the shaft. The fall killed him.

(6) It is materially undisputed that, at the time of the accident, the decedent was an employee of an independent contractor – Wall – who had been hired by BVC on behalf of MVP. Thus, the *Privette* doctrine is triggered. That doctrine acts as a defense to plaintiffs' Complaint against BVC, MVP, and Dabbour because of the workers compensation exclusive remedy.

(7) Moreover, the hirers – MVP and BVC – expressly and implicitly delegated to their independent contractor – Wall – their statutory duty to comply with federal and state regulatory safety rules pertaining to the work site. (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600-03, 129 Cal.Rptr.3d 601, 258 P.3d 737.) Here, it is materially undisputed that there was a written subcontract in which MVP and BVC delegated workplace safety to Wall. It is also materially undisputed that Cal OSHA issued citations for several workplace violations which contributed to the accident, including the placement of drywall in such a manner that it blocked the wooden barriers which had been erected to prevent falls down the elevator shaft. Under the *Privette* doctrine, neither the independent contractor nor the hirer is liable in tort for the injury or death of the independent contractor's employee arising from a violation of a workplace safety regulation.

(8) Plaintiffs have produced evidence creating a material triable dispute concerning the factual question of whether MVP, BVC, and Dabbour retained control of the worksite in such a manner as to have

affirmatively contributed to the fatal accident. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 214-15, 115 Cal.Rptr.2d 853, 38 P.3d 1081 ("*Hooker*"); *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 717-18, 208 Cal.Rptr.3d 699 ("*Khosh*").) In this context, "affirmative contribution" means "active participation" which ". . . may take the form of directing the contractor about the manner or performance of the work, directing that the work be done by a particular mode, or actively participating in how the job is done." (*Khosh, supra*, 4 Cal.App.5th at p. 718, 208 Cal.Rptr.3d 699.)

(9) Plaintiffs have identified evidence which creates a material triable factual dispute concerning MVP's, BVC's and Dabbour's retained control of the worksite and active participation in the accident. Dabbour was MVP's and BVC's on-site supervisor. He was actively involved in directing the work of all subcontractors, including Wall, daily. There is conflicting evidence about whether an employee of BVC or MVP directed the drywall supplier, Westside Building Material Corporation ("*Westside*"), to place the drywall in front of the elevator shaft in a manner which blocked the guard rail and contributed to the accident. There is also conflicting evidence about whether the decedent and Omero notified BVC's on-site personnel repeatedly about their safety concerns about the placement of the drywall, including requests to move it. These notifications and requests were ignored, according to Omero. BVC, MVP and Dabbour dispute these facts. BVC and MVP have presented opposing evidence of the degree of their control and negating affirmative contribution.

(10) Thus, plaintiffs fail to meet their initial burden of production and persuasion that the issue of duty must necessarily be resolved in their favor on a record of undisputed material facts. The record before the Court is materially disputed as to the existence of duty, as well as the *Privette* defense. Accordingly, the Court must deny the motion for summary adjudication of the issue of duty. A trier of fact, properly instructed on the nature of any duty and of the *Privette* defense, must decide whether MVP and BVC retained control over the worksite in a manner which affirmatively contributed to the decedent's death.

The Clerk shall give notice of this ruling. Counsel for MVP, BVC and Dabbour shall serve and file a proposed order consistent with the above and in conformity with the Code of Civil Procedure and the Rules of Court. A copy of this ruling may be attached to any such proposed order in lieu of copying same verbatim in the body of the document. That proposed order may be e-mailed to the Court as follows: Courtroom20@ventura.courts.ca.gov. The Court will process the order in this manner as a result of the Covid-19 court closure.